

5/29/01

**THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
OF THE T.T.A.B.**

Paper No. 18  
TJQ

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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Gooch Foods, Inc.

v.

Larossa USA, Inc.

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Opposition No. 112,490  
to application Serial No. 75/359,224  
filed on September 18, 1997

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Frank P. Presta of Nixon & Vanderhye for Gooch Foods, Inc.

Mark C. Gregory of Huntley & Associates for Larossa USA,  
Inc.

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Before Seeherman, Hanak and Quinn, Administrative Trademark  
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by Larossa USA, Inc. to  
register the mark shown below

for "processed fruits and vegetables, tuna and processed anchovies."<sup>1</sup>

Registration was opposed by Gooch Foods, Inc. under Section 2(d) of the Trademark Act on the ground of likelihood of confusion with opposer's six previously used and registered marks. The registered marks are as follows:

for "alimentary paste products;"<sup>2</sup>

for "butter, macaroni products, noodles and pastina, a macaroni product cut up in small fanciful shapes;"<sup>3</sup>

for "alimentary pastes, pizza pie mix, and canned sauce therefor, canned spaghetti sauces, with meat, without meat,

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<sup>1</sup> Application Serial No. 75/359,224, filed September 18, 1997, alleging dates of first use of October 31, 1996. The application includes the following statement: "The English translation of all foreign wording in the mark is 'The Red One.'"

<sup>2</sup> Registration No. 313,418, issued May 29, 1934; renewed.

<sup>3</sup> Registration No. 389,868, issued August 26, 1941; renewed.

with mushrooms and marinara, ravioli with meat in sauce, meat balls in sauce, and sausage links with sauce;"<sup>4</sup>

for "alimentary pastes, pizza pie mix, and canned sauce therefor, canned spaghetti sauces, with meat, without meat, with mushrooms and marinara, ravioli with meat in sauce, and cheese ravioli in sauce, meat balls in sauce, sausage links with sauce, and canned soups;"<sup>5</sup>

for "spaghetti, lasagna, macaroni, noodles and bread crumbs;"<sup>6</sup> and LA ROSA in typed form for "alimentary pastes and bread crumbs."<sup>7</sup> The registrations indicate that "La Rosa" translated into English means "The Rose."

Applicant, in its answer, denied the salient allegations of likelihood of confusion.

The record consists of the pleadings; the file of the involved application; certified copies of opposer's pleaded

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<sup>4</sup> Registration No. 623,193, issued March 13, 1956; renewed.

<sup>5</sup> Registration No. 651,541, issued September 10, 1957; renewed.

<sup>6</sup> Registration No. 1,390,117, issued April 15, 1986; combined Sections 8 and 15 affidavit filed.

<sup>7</sup> Registration No. 1,396,003, issued June 3, 1986; combined Sections 8 and 15 affidavit filed.

registrations; and applicant's answers to certain of opposer's interrogatories introduced by way of opposer's notice of reliance. Applicant did not take testimony or offer any evidence. Both parties filed briefs on the case. An oral hearing was not requested.

Before turning to the merits of the opposition, we direct our attention to an evidentiary matter arising from the attachments to applicant's brief on the case at final hearing. As noted above, applicant neither took testimony nor offered any evidence, yet several documents not properly made of record were attached to its brief. Opposer, in its reply brief, has objected to the attachments.

The objection is well taken. Exhibits and other evidentiary materials attached to a party's brief on the case can be given no consideration unless they were properly made of record during the time for taken testimony. *TBMP* §705.02 and cases cited therein, e.g., *Maytag Co. v. Luskin's, Inc.*, 228 USPQ 747 (TTAB 1986). Further, factual statements made in a party's brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial. Statements in a brief have no evidentiary value, except to the extent that they may serve as admissions against interest. *TBMP* §706.02.

In the present case, none of the materials attached to applicant's brief were properly made of record.

Accordingly, they have not been considered in making our decision. Further, any factual statement made on the basis of this evidence has not been considered.<sup>8</sup>

We now turn to opposer's likelihood of confusion claim. With respect to priority of use, opposer's ownership of valid and subsisting registrations establishes opposer's priority. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In *re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

In any likelihood of confusion analysis, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Insofar as the parties' goods are concerned, we start with the premise that they need not be identical or even competitive to support a holding of likelihood of confusion. It is sufficient that the goods are so related or that

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<sup>8</sup> As a final matter, applicant's allegations of opposer's misconduct in this proceeding are not supported by the record and, more importantly, are irrelevant to the merits of the likelihood of confusion claim.

conditions surrounding their marketing are such that they are encountered by the same persons who, because of the relatedness of the goods and the similarities between the marks, would believe mistakenly that the goods originate from or are in some way associated with the same producer. *Hercules Inc. v. National Starch and Chemical Corp.*, 223 USPQ 1244, 1247 (TTAB 1984).

Opposer's and applicant's goods are related in a general sense in that they can be classified broadly as "food products." In saying this, we recognize that there is no per se rule in likelihood of confusion cases involving foods. *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 153 (CCPA 1978). More specifically, however, the goods herein are complementary. In this connection, we find that, for example, applicant's anchovies or processed vegetables could be used as toppings with registrant's pizza pie mix and canned sauces therefor. Further, applicant's processed fruits and vegetables would encompass tomatoes (a fact borne out by the inclusion of a tomato in applicant's cornucopia design),<sup>9</sup> a major ingredient of products such as the sauces (spaghetti, pizza,

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<sup>9</sup> The question of whether a tomato is a fruit or a vegetable is of no moment given that both processed fruits and vegetables are listed in applicant's identification of goods.

and marinara) identified in registrant's identification of goods.<sup>10</sup>

The parties' goods move through the same channels of trade (e.g., grocery stores) to the same classes of purchasers. Given the nature of the specific food products, it also is reasonable to assume that they are relatively inexpensive and are the subjects of impulse purchases. See: *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1282 [when both products are relatively inexpensive, comestible goods subject to frequent replacement, purchasers of such products have been held to a lesser standard of purchasing care].

In comparing the marks, although we stress that we have considered the marks in their entirety, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of the mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entirety." In re *National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). We find that the word portions of the parties' marks dominate over any design feature therein, and that the word portion LA ROSSA in applicant's mark is similar to

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<sup>10</sup> We take judicial notice of the dictionary definition of "marinara:" "a highly seasoned sauce of tomatoes, garlic, and spices." *The Random House Dictionary of the English Language* (2d ed. unabridged 1987).

registrant's LA ROSA marks. See: Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565, 218 USPQ 390, 395 (Fed. Cir. 1983); and In re Appetito Provisions Co., 3 USPQ 1553 (TTAB 1987). The literal portion would be the portion most likely to be remembered by consumers and to be used in calling for the goods. The terms LA ROSSA and LA ROSA are similar in terms of sound and appearance. Although the terms have different meanings when translated into English, many consumers may not even be aware of the English translations. In any event, this difference is outweighed by the fact that the terms sound and look alike.

In sum, the general overall commercial impression engendered by the marks is similar. It is the general overall commercial impression engendered by the marks that must determine, due to the fallibility of memory and the consequent lack of perfect recall, whether confusion as to source or sponsorship is likely. The proper emphasis is thus on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. In re United States Distributors, Inc., 229 USPQ 237, 239 (TTAB 1986).

To the extent that any of the differences between the parties' marks and goods cast doubt on our finding of likelihood of confusion, we resolve that doubt, as we must,

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in favor of the prior registrant. Giant Food, Inc. v. Nation's Foodservice, Inc., supra.

Decision: The opposition is sustained, and registration to applicant is refused.